SUPREME COURT, U. S.

OCT 19 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 676

VITO GENOVESE,

Petitioner,

—against—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review a judgment and order of the United States Court of Appeals for the Second Circuit entered in the above entitled proceeding on September 19, 1968 which order affirmed an order of the United States District Court for the Southern District of New York, denying petitioner's application for an order pursuant to 28 U.S.C. 2255 to set aside his conviction and sentence.

Opinion Below

The Court of Appeals rendered no opinion.

The opinion of the District Court, Pollack, J., is not reported and may be found in the appendix at pages A2-7.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The order of the Court of Appeals was entered on September 19, 1968, and may be found in the appendix at page A1.

Questions Presented

1. Did the Court properly "entertain" the application within the rule of *Sanders* v. *U.S.*, 373 U.S. 1 (1963), or did it act mainly by reference to previous proceedings and not give the independent consideration required for the new ground raised?

2. Is the imposition of costs on an unsuccessful appellant from the denial of a motion to vacate a sentence of imprisonment brought under 28 U.S.C. 2255 improper as in violation of Rule of Appellate Procedure 39 and as placing the prisoner under threat of an increased penalty?

Statutes Involved

The statutes involved are 28 U.S.C. 2255 which appears in the appendix at pages A8-9, Rule of Appellate Procedure 39 which appears in the appendix at pages A9-10 and 28 U.S.C. 2412 which appears in the appendix at page A11.

Statement

Vito Genovese was one of fifteen defendants convicted of conspiracy to violate 21 U.S.C. 173 and 174 in the United States District Court for the Southern District of New York in No. C 156-157. On April 17, 1959 he was sentenced to fifteen years' imprisonment and fined $20,000 (25a).*

* References "a" to appendix in the Court of Appeals.

He is now a federal prisoner under this sentence. He has already served the greater part of this sentence. He moves pursuant to 28 U.S.C. 2255 to vacate the judgment against him (4-5a). What is involved is not only the remainder of the sentence but clearing his name.

The original conviction was appealed to the Court of Appeals for the Second Circuit, *U.S.* v. *Aviles*, and affirmed 274 F. 2d 179 (1960), *cert. denied*, 362 U.S. 974 (1960). A motion for a new trial was then made on the ground of newly discovered evidence and for failure of the prosecution to produce minutes in its possession. This was denied. The Court of Appeals affirmed. In the Supreme Court of the United States the order was vacated and the case remanded to the Court of Appeals. The Court of Appeals again affirmed, Judge Marshall dissenting. The Supreme Court denied certiorari. *U.S.* v. *Aviles*, 197 F. Supp. 536 (S.D.N.Y. 1961), aff'd. 351 F. 2d 186 (2d Cir.), vacated and remanded *sub nom. Evola* v. *U.S.*, 375 U.S. 32 (1963), aff'd. 337 F. 2d 552 (2d Cir. 1964), *cert. denied*, 380 U.S. 906 (2d Cir. 1965).

Subsequently an application was made pursuant to 28 U.S.C. 2255. This was denied by Judge Weinfeld, 269 F. Supp. 616 (1966) which denial was affirmed in the Court of Appeals, 378 F. 2d 748 (1967).

The present application is based on an affidavit of petitioner's counsel (4a-19a) with detailed reference to the voluminous trial record. This affidavit particularly points out that the evidence as to petitioner at the trial, both direct and cross examination of a single witness, took nineteen minutes in a trial of some twelve weeks with original stenographic minutes of some 7600 pages (5-6a). The charge of the trial judge on the necessity of finding evidence as to an individual

defendant is set forth at length with comments. Ambiguous, confusing and prejudicial language in the charge is shown. It is emphasized that the evidence against petitioner was of the slightest and from the most tainted source. Publicity given to petitioner both before and during the trial is referred to.

Reasons for Granting the Writ

1.

A. *Sanders* teaches that a ground not previously raised may be the subject of an application under 2255. Even though parallel or related matters were previously raised and decided adversely to petitioner he is still entitled to a full and complete consideration of his point as now raised particularly when a change in the law is the basis of the application.

The rule in *Sanders* is sweeping (373 U.S. at 15-17):

> "We think the judicial and statutory evolution of the principles governing successive applications for federal habeas corpus and motions under §2255 has reached the point at which the formulation of basic rules to guide the lower federal courts is both feasible and desirable. Compare *Townsend* v. *Sain,* 372 U.S. 293, 310. Since the motion procedure is the substantial equivalent of federal habeas corpus, we see no need to differentiate the two for present purposes. It should be noted that these rules are not operative in cases where the second or successive application is shown, on the basis of the application, files, and records of the case alone, conclusively to be without merit. 28 U.S.C. §§2243, 2255. In such a case the application should be denied without a hearing.

"A. Successive Motions on Grounds Previously Heard and Determined.

"Controlling weight may be given to denial of a prior application for federal habeas corpus or §2255 relief* only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

"(1) By 'ground,' we mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations. So also, identical grounds may often be supported by different legal arguments, cf. *Wilson* v. *Cook*, 327 U.S. 474, 481; *Dewey* v. *Des Moines*, 173 U.S. 193, 198, or be couched in different language, *United States* v. *Jones*, 194 F. Supp. 421 (D.C.D. Kan. 1961) (dictum), aff'd mem., 297 F. 2d 835 (C.A. 10th Cir. 1962), or vary in immaterial respects, *Stilwell* v. *United States Marshals*, 192 F. 2d 853 (C.A. 4th Cir. 1951) (*per curiam*). Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant.

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*The discussion in this opinion relates, of course, solely to the problem of successive applications for federal collateral relief. For the principles which govern where the prior application is not for federal collateral relief, see *Fay* v. *Noia*, *supra* and *Townsend* v. *Sain*, *supra*."

"(2) The prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application. See *Hobbs* v. *Pepersack*, 301 F. 2d 875 (C.A. 4th Cir. 1962). This means that if factual issues were raised in the prior application, and it was not denied on the basis that the files and records conclusively resolved these issues, an evidentiary hearing was held. See *Motley* v. *United States*, 230 F. 2d 110 (C.A. 5th Cir. 1956); *Hallowell* v. *United States*, 197 F. 2d 926 (C.A. 5th Cir. 1952).
"(3) Even if the same ground were rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground. If factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair; we canvassed the criteria of a full and fair evidentiary hearing recently in *Townsend* v. *Sain, supra*, and that discussion need not be repeated here. If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. Two further points should be noted. *First*, the foregoing enumeration is not intended to be exhaustive; the test is 'the ends of justice' and it cannot be too finely particularized. *Second*, the burden is on the applicant to show that, although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground.

The ground raised on the second 2255 application was that the Court in this case did not properly apply *Mason* v. *U.S.*, 383 F. 2d 107, handed down in the Tenth Circuit on

October 13, 1967, subsequent to any proceeding on behalf of Vito Genovese.

The conviction there, as here, was pursuant to 21 U.S.C. 174. The ground of reversal was simply stated (383 F. 2d at 109):

> "The instructions did not state that the evidence must show that each defendant had knowledge of illegal importation, nor does it state that the guilty knowledge of one defendant cannot be imputed to the other defendants to establish the conspiracy. The charge does explain the statutory presumption in terms of actual or constructive possession but goes no further, and it does not explain that possession necessary to raise the statutory presumption must be found for each defendant, absent evidence showing actual knowledge of illegal importation. While the court's charge is appropriate for a general conspiracy under 18 U.S.C. §371, the charge does not focus on particular elements of a conspiracy proscribed by 21 U.S.C. § 174. See United States v. Massiah, 307 F. 2d 62 (2d Cir.), *rev'd on other grounds,* 377 U.S. 201."

It is not contended that a legal scholar with a leaning towards literary detection could not piece together the requisite instructions from the charge given. It is contended that there was no simple statement of this basic requirement of individual knowledge of illegal importation of narcotics to impose individual responsibility. It is further contended that the charge was prolix, ambiguous, confusing and positively contradictory. The analysis spelled out in detail in the moving affidavit will not be repeated.

The opinion on this application does not examine the charge for compliance with the *Mason* rule. There are selections from the trial court's charge which Judge Pollack found to meet the requirements of *Mason*. These selections however are just that—selections. They can be pointed to as some sort of statements of the rule. It is submitted however that when the whole charge is read, as it must be, to determine whether the rule was effectively communicated to the trial jury rather than merely ritually incanted in the midst of contradictory and confusing matter, the selections are not enough. Consideration must be given to the impact of the whole charge and when this has been done it is submitted that the trial jury did not receive an instruction that Vito Genovese could be found guilty only if he personally, individually had knowledge of the illegal importation of narcotics. The language quoted in the opinion below does not weigh the proper instructions given with others that must have confused the jury on this point and deprived the instructions of any value to petitioner.

The Courts below could under *Sanders,* properly "entertain" the second successive motion under 2255. The Second Circuit pointed out in *U.S.* v. *Sobell,* 314 F. 2d 314 at 318, *cert. den.* 374 U.S. 857 (1963); that having "entertained" the successive motion full consideration must be given. It is submitted that despite the thoughtful, reasoned opinion below, this has not been done. The Courts below acted, as the opinion shows primarily by reference to the previous proceedings and did not give the independent consideration as a matter de novo that is required for the new ground raised.

Judge Blumenfeld in *U.S.* v. *Reincke,* 229 F. Supp. 132 at 141 (D.C. Conn. 1964) said:

"* * * The principle of res judicata is inapplicable in a habeas corpus proceeding. As stated by Mr. Justice Brennan in Sanders v. United States, 373 U.S. 1, 8, 83 S.Ct. 1068, 1073, 10 L.Ed2d 148 (1963):

'Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.' In one sense the right of the government to imprison a person is determined by the judgment of conviction. But another view of the matter is that the government must, as often as the question arises, demonstrate its right to continue the restraint of liberty and that a challenge of its right to do so creates a present dispute to be determined by present constitutional standards. Compare Sanders v. United States, supra, 373 U.S. at 17, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); Fay v. Noia, supra, 372 U.S. at 401-402, 83 S.Ct. 822, 9 L.Ed. 2d 837 (1963).[13]

"[13]The legal and historical basis of habeas corpus was summed up in Fay v. Noia:

> 'Although in form the Great Writ is simply a mode of procedure, its history in inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment; if the imprisonment cannot be shown to conform with the fundamental requirements of laws, the individual is entitled to his immediate release.' (372 U.S. at 401-402, 83 S.Ct. at 828, 9 L.Ed.2d 837)

"Subsequently in *Sanders* v. *United States* the Supreme Court, in discussing problems raised by successive habeas corpus applications, stated:

> 'If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing

> an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application.' (373 U.S. at 17, 83 S.Ct. at 1078, 10 L.Ed.2d 148)"

More simply Judge Weinfeld in the sixth *Sobell* application said (264 F. Supp. 579 at 582, aff'd. 378 F. 2d 674 (2nd Cir. 1967) *cert. denied,* 389 U.S. 1051 (1968):

> "Finally the government urges that the records and files of this court not only show petitioner is not entitled to relief, but that his application is a flagrant abuse of section 2255 because it is totally groundless and because of failure to allege previously facts known or which with due diligence should have been known to him at the time of trial and on his various post-conviction applications. Whatever the merits of these respective contentions, petitioner's charge must be considered."

Petitioner has not had this kind of consideration. The decision below refers for three pages to prior proceedings before taking up the present claim which it speedily finds "lacks merit". In other words before the Court below gave independent consideration to the present application it had already decided that the application was to be denied.

B. The conclusion of the opinion below is:

> "If petitioner's claim is old, it has been disposed of and lacks merit at all events. If it is new, it lacks merit and alternatively it is not reviewable under § 2255."

The Court was quite obviously influenced in making this statement by the Second Circuit holding in *Sobel* (314 F. 2d at 320-324) that subsequent decisions are not a ground

for a 2255 application but that the errors claimed must rise to constitutional dimensions. This holding was prior to *Sanders*. *Sanders* is labeled as not applying to the particular facts involved but a "formulation of basic rules to guide the lower courts."

The *Sanders* opinion does not expressly state that the change in law may be merely decisional. But there is no statement to that effect and clarification is required.

The argument in the Court of Appeals raised the question whether *Mason* was not merely an application of the prior rule in the Second Circuit expressed in *Massiah*, 307 F. 2d 62, reversed on other grounds, 377 U.S. 201. It is submitted that *Massiah* is not as clear as *Mason* and that until *Mason*, because of the reversal, *Massiah* was somewhat suspect as an authority.

C. The interests of justice must be considered.

Defending a conspiracy charge is difficult. There are unsavory co-defendants. There is unfavorable publicity from the mass of the accused and the gravity of the accusation. The innocent individual may well be lost in a mass of testimony where there is very little evidence against him.

The evidence against this defendant was of the slimmest. Its source was most suspect and there was a subsequent recantation. This defendant was certainly a victim of extensive, unfavorable publicity. The prosecution's tactics at the trial could not be approved by a unanimous court.

Concededly each of these items and even the three in combination have been weighed in the scales of justice and have been found wanting. Now a new element is placed in the scale.

The previous items were not enough for the previous courts to outweigh the presumption of legality following the trial. But they cannot be forgotten. They still exist and in combination with the defects in the charge they should be considered as to whether this defendant was convicted fairly.

True, as the Government points out there are "the rightful claims of organized society". These however must be balanced with the rights of the individual, guaranteed constitutionally, to a fair trial and the concomittant right of a prisoner to call on the government to justify its keeping him in prison in the face of subsequent decisions which would invalidate his conviction.

2.

The judgment sought to be reviewed awards costs to the government. This may or may not be justified under rule 39 (b) of the Rules of Appellate Procedure.

The question that arises is whether under 28 U.S.C. 2412 this is a "civil action". Section 2255 itself refers to the proceeding as a motion, not an action. However in a "motion" as distinguished from an action, costs cannot be recovered under authority of a statute and the rule would have no application.

As pointed out in *Patton* v. *North Carolina,* 381 F. 2d 636, (4th Cir., 1967), the consequence of a new trial shall not be to increase the penalty of a defendant. When an attempt is made, even unsuccessfully, to set aside a conviction and the result is the imposition of costs, the penalty already imposed is being increased.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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